APPELLANT PRO SE:

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IN THE
COURT OF APPEALS OF INDIANA

ROOSEVELT LOVE,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 48A02-0603-CR-257
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE MADISON SUPERIOR COURT
The Honorable Fredrick R. Spencer, Special Judge
Cause No. 48D01-9907-CF-176

January 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Roosevelt Love ("Love") appeals the denial of his Amended Verified Petition for Post Conviction Relief ("Petition"). We affirm.

Issues

Love raises two issues in his Petition, which we restate as follows:[1]

1) Whether his trial counsel was ineffective; and

2) Whether alleged newly-discovered evidence, the victim's recantation eight years after the incident, required a new trial.

Facts and Procedural History

On direct appeal, this Court described the events of November 5, 1997 as follows: "Love's thirteen-year-old daughter, S.L., smoked marijuana that Love had given to her earlier that day. Several hours later, Love inserted his finger into S.L.'s vagina and had sexual intercourse with her." Love v. State, No. 48A04-0009-CR-379, slip op. at 2 (Ind. Ct. App. March 27, 2001). The State charged Love with two counts of Child Molesting, both Class A felonies,[2] and Incest, a Class B felony.[3] Also, the State sought to have Love adjudicated as a Habitual Offender,[4] but later dismissed this count.

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[1] Love raises two additional issues, which we decline to consider. In both, Love argues that the trial court abused its discretion in admitting certain evidence. However, Love did not raise either argument in his direct appeal. Love v. State, No. 48A04-0009-CR-379, slip op. (Ind. Ct. App. March 27, 2001). When an issue is available at the time of direct appeal, but is not raised, it is precluded from review in a subsequent post-conviction proceeding. Taylor v. State, 840 N.E.2d 324, 330-31 (Ind. 2006). Accordingly, Love has waived these issues.

[2] Ind. Code § 35-42-4-3(A)(1).

[3] I.C. § 35-46-1-3.

[4] I.C. § 35-50-2-8(A).

At trial, S.L. testified that Love penetrated her vagina with his finger, that Love had sexual intercourse with S.L., and that he ejaculated. During her testimony, two photographs of her bedroom were admitted into evidence without objection.

Dr. Marlin Schul testified that he examined S.L., and found dead sperm in her "vaginal vault." Appendix, Trial Transcript at 501-03.[5] Officer Carl Sobieralski, a forensic scientist with the Indiana State Police, was qualified without objection as an expert in DNA analysis. During his testimony, Love's attorney, Doug Long, objected to the chain of custody for two State exhibits, and objected to the admission of any evidence regarding probabilities. Both objections were overruled. Sobieralski testified that the physical evidence was consistent with Love, and would occur in one in 900 million African-Americans. **(**Love is African-American.) Love's attorney cross-examined Sobieralski on the status of DNA analysis as a hard or soft science, whether the officer confused the male and female DNA samples, whether the sperm and non-sperm samples were intermingled, and whether the quality of the samples was low. Sobieralski acknowledged that his conclusions were based upon probabilities, and indicated that the physical evidence and his handling of that evidence was sufficient to support the conclusions that he had reached.

In an evidentiary hearing outside the presence of the jury, Love testified that when Officer Kevin Smith entered the home, "he asked if he could see the room, take pictures. He had a camera, came in and took pictures and stuff." Id. at 554. Officer Smith testified, "I wanted to talk with [the neighbor], look at the house, look at [S.L.'s] bedroom, take

photographs of her bedroom." Id. at 567. The State then asked whether he did all those things. The next ten pages of the trial transcript are missing. In closing argument, the State referenced the photographs as probative of the presence of objects that S.L. had referenced in her testimony, including petroleum jelly and a curling iron.

The jury found Love guilty of all three counts. In light of double jeopardy concerns, the trial court entered judgment of conviction on only one count, Child Molesting. The trial court sentenced Love to forty-six years imprisonment, all of which was to be executed. On direct appeal, Love argued that the trial court abused its discretion in admitting evidence that he gave marijuana to the victim prior to molesting her. This Court affirmed Love's conviction. Love v. State, No. 48A04-0009-CR-379.

In 2001, Love sought post-conviction relief, filing his Amended Verified Petition for Post Conviction Relief on October 28, 2004. App., CCS at 10, 11. At the post-conviction hearing, he testified that, per Officer Smith's request, Love showed him S.L.'s bedroom, but Love objected to his taking photographs. App., April 18, 2005 PC Transcript at 9.

Also in the post-conviction hearing, S.L. recanted her prior statements and testimony, in which she had consistently accused Love of molesting her. She testified that an officer "told me that if I didn't testify, that they was gonna put me and my mother in jail." App., June 6, 2005 PC Transcript at 44. She further testified that she was told to testify at trial that Love had raped her, when in fact, he had not. In response to a question from the post-conviction judge, however, the victim acknowledged telling a neighbor, prior to the police

[5] Appellant's Appendix does not comply with multiple provisions of the Appellate Rules, including Ind. Appellate Rule 51(C). Accordingly, our citations reference the page numbers of individual documents, rather

arriving, that her father had raped her. S.L. explained that she made that statement to the neighbor because "I kept getting in trouble at school. I was on punishment. I was tired of living in that household. I wanted to be on my own and that was the way I could do that was to get rid of my daddy." Id. at 47. When questioned regarding why genetic material would be inside her body, S.L. indicated that she had had sexual intercourse with a non-relative two days prior to the alleged incident. She had no explanation of how genetic material of a relative would have been retrieved from within her body.

On February 2, 2006, the trial court denied Love's Petition. He now appeals.

Discussion and Decision

I. Standard of Review

Our review in post-conviction proceedings is well established.

> Post-conviction proceedings do not afford a petitioner an opportunity for a super appeal. Post-conviction proceedings provide the petitioner with an opportunity to raise issues that were not known to him or her at the time of the original trial or were not available upon direct appeal. The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. To succeed on appeal from denial of post-conviction relief, the petitioner must show that the evidence is without conflict and leads unerringly and unmistakably to a conclusion opposite the one reached by the post-conviction court.
>
> When reviewing the denial of a petition for post-conviction relief, we do not weigh the evidence or judge the credibility of the witnesses. We will only conclude that a post-conviction court's decision is contrary to the law where the evidence is without conflict and leads to but one conclusion, and the post-conviction court has reached the opposite conclusion.

King v. State, 848 N.E.2d 305, 307 (Ind. Ct. App. 2006) (internal citations and quotations omitted).

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than the Appendix.

II. Ineffective Assistance of Counsel

Love argues that his trial counsel was ineffective by failing to object to the admission of photographs and statements of Officer Smith, and by not being sufficiently experienced in DNA evidence to cross-examine the State's expert.[6] A defendant is entitled to effective assistance of counsel. Dillon v. State, 492 N.E.2d 661, 665 (Ind. 1986). We review claims of ineffective assistance of counsel based upon the principles enunciated in Strickland v. Washington, 466 U.S. 668 (1984).

> [A] claimant must demonstrate that counsel's performance fell below an objective standard of reasonableness based on prevailing professional norms, and that the deficient performance resulted in prejudice. Prejudice occurs when the defendant demonstrates that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." A reasonable probability arises when there is a "probability sufficient to undermine confidence in the outcome."

Grinstead v. State, 845 N.E.2d 1027, 1031 (Ind. 2006) (quoting Strickland, 466 U.S. at 694). Further, there is a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Stevens v. State, 770 N.E.2d 739, 746 (Ind. 2002) (citing Strickland, 466 U.S. at 690), cert. denied at 540 U.S. 830. Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective. Id. at 747.

As to admission of the photographs and testimony of Officer Smith, the post-conviction court concluded that, "Love's testimony reveal[ed] that he consented to the search and photographing of his bedroom and contradicts the claims he made at his post-conviction

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relief hearing." App., PC Order at 4. Our review is constrained by the absence of ten pages of trial transcript. Nonetheless, the existing record supports the conclusion that Love consented to the search. He testified that Officer Smith "asked if he could see the room, take pictures. He had a camera, came in and took pictures and stuff." App., Tr. Trans. at 554. At a post-conviction hearing, Love acknowledged taking Officer Smith to S.L.'s bedroom. In light of this evidence, we cannot conclude that trial counsel's failure to object to admission of Officer Smith's photographs fell below prevailing professional norms. Furthermore, admission of the two photographs paled in comparison to a girl recounting her own father's violence, and the genetic evidence taken from within her body. It is highly unlikely that exclusion of the photographs and Officer Smith's description of the bedroom would have changed the result.

Meanwhile, as to trial counsel's cross-examination of the State's DNA witness, the post-conviction court concluded that "defense counsel adequately cross-examined him." App., PC Order at 4. Love's attorney objected to the chain of custody, objected to admission of any evidence regarding probability, cross-examined the State's expert regarding the nature of DNA analysis, and further cross-examined him as to whether his methods in this case were adequate to support his conclusions. In his Petition, Love argues that his attorney "was not qualified in DNA testing to cross examine state's expert." Appellant's Brief at 8. Love, however, makes no cogent argument as to how counsel's performance fell below the objective standard, or why the result would have been different with more extensive cross-

[6] In one sentence of this argument, Love also argues that his convictions constituted double jeopardy. However, we note that the trial court entered only one judgment of conviction.

examination. Accordingly, we conclude that Love's trial counsel was not ineffective.

III. Newly-Discovered Evidence

During the post-conviction hearing, S.L. testified that the police had forced her to lie at trial and that, in fact, Love had not molested her. Love argues that this newly-discovered evidence would have produced a different outcome at trial. Without explicit request, Love effectively seeks a new trial in which the victim's recantation could be admitted.

Our Supreme Court has enunciated nine, conjunctive criteria for admission of newly discovered evidence.

> [N]ew evidence will mandate a new trial only when the defendant demonstrates that: (1) the evidence has been discovered since the trial; (2) it is material and relevant; (3) it is not cumulative; (4) it is not merely impeaching; (5) it is not privileged or incompetent; (6) due diligence was used to discover it in time for trial; (7) the evidence is worthy of credit; (8) it can be produced upon a retrial of the case; and (9) it will probably produce a different result at retrial.
>
> This Court analyzes these nine factors with care, as the basis for newly discovered evidence should be received with great caution and the alleged new evidence carefully scrutinized. The burden of showing that all nine requirements are met rests with the petitioner for post-conviction relief.

Taylor v. State, 840 N.E.2d 324, 329-30 (Ind. 2006) (internal citations and quotations omitted).

Here, the post-conviction court concluded that "[w]hile the victim's recantation at the post-conviction hearing satisfies most of the criteria outlined above, it does not satisfy criteria seven and nine." App., PC Order at 5. The post-conviction court concluded that the victim's recantation was not worthy of credit "in light of her consistent prior statements and testimony," and that it probably would not produce a different result if the case were retried

"because of the weight that a jury would probably afford the State's D.N.A. evidence." Id.

Despite S.L.'s recantation, given eight years after the incident, she could not explain how genetic material from a male relative could have been discovered in her body. In statements the day of the incident and at trial, S.L. testified that her father molested her. Significant physical evidence supported her multiple recounts of the episode. This evidence does not lead unerringly and unmistakably to a conclusion opposite the one reached by the post-conviction court.

Conclusion

We conclude that Love's attorney was not ineffective and that the alleged newly-discovered evidence does not require a new trial.

Affirmed.

VAIDIK, J., and BARNES, J., concur.